

Robert A. Mittelstaedt (SBN 060359)
Jason McDonell (SBN 115084)
Elaine Wallace (SBN 197882)
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700
ramittelstaedt@jonesday.com
jmcdonell@jonesday.com
ewallace@jonesday.com

Tharan Gregory Lanier (SBN 138784)
Jane L. Froyd (SBN 220776)
JONES DAY
1755 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 739-3939
Facsimile: (650) 739-3900
tglanier@jonesday.com
jfroyd@jonesday.com

Scott W. Cowan (Admitted *Pro Hac Vice*)
Joshua L. Fuchs (Admitted *Pro Hac Vice*)
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002
Telephone: (832) 239-3939
Facsimile: (832) 239-3600
swcowan@jonesday.com
jlfuchs@jonesday.com

Attorneys for Defendants
SAP AG, SAP AMERICA, INC., and
TOMORROWNOW, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ORACLE USA, INC., et al.,

Plaintiffs,

v.

SAP AG, et al.,

Defendants.

Case No. 07-CV-1658 PJH (EDL)

**DECLARATION OF JOSHUA L.
FUCHS IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
ORACLE'S MOTION TO MODIFY
THE PROTECTIVE ORDER AND TO
COMPEL DEPOSITION TESTIMONY
AND FURTHER RESPONSES TO
REQUESTS FOR ADMISSIONS**

DISCOVERY MATTER

1 I, Joshua L. Fuchs, declare as follows:

2 1. I am an associate in the law firm of Jones Day, 717 Texas, Suite 3300, Houston,
3 Texas, a member in good standing of the bar of Texas and admitted *pro hac vice* and counsel of
4 record for Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc. in the above-
5 captioned action. I make this declaration based on personal knowledge and, if called upon to do
6 so, could competently testify thereto. Nothing in this declaration is intended to waive, or should
7 be construed as a waiver of, the attorney-client privilege or attorney work product immunity.

8 **RFA Counts**

9 2. On September 27, 2007, Oracle served a set of RFAs containing 154 requests on
10 Defendant TomorrowNow, Inc (“TN”). On May 20, 2009, Oracle served a second set of RFAs
11 containing 545 requests on all Defendants. Also on May 20, 2009, Oracle served a third set of
12 RFAs containing 50 requests on all Defendants. On September 30, 2009, Oracle served a fourth
13 set of RFAs containing 279 requests on all Defendants. On October 23, 2009, Oracle served a
14 fifth set of RFAs containing 202 requests on all Defendants. On November 2, 2009, Oracle
15 served a sixth set of RFAs containing 85 requests on all Defendants. Therefore, Oracle has
16 served a total of 1,315 RFAs on Defendants.

17 3. In Oracle’s Motion, it has moved to compel further responses to 316 of Oracle’s
18 1,315 RFAs served on Defendants.

19 4. A review of the of the 1,315 RFAs shows that 539 of those requests contain the
20 term “copy,” and out of the 223 RFAs put at issue in Oracles’ Motion relating to Oracle’s Second
21 Set of RFAs to Defendants Nos. 496-680 and Oracle’s Third Set of RFAs to Defendants Nos. 13-
22 50, a total of 118 contain the term “copy.”

23 5. The specific requests from 496-680 that are put at issue in Oracle’s Motion and
24 that contain the word “copy” are: 500-507, Amended 512-Amended 519, Amended 524-
25 Amended 527, Amended 532-Amended 535, Amended 540-Amended 559, 564-571, 611-614,
26 629-632, 641-648, 655-662, and 669-676. *See* Russell Decl. (D.I. 571), Ex. W.

27 6. The specific requests from 13-50 that are put at issue in Oracle’s Motion and that
28 contain the word “copy” are: 13-44 and 46-47. *See* Russell Decl. (D.I. 571), Ex. Y.

7. The specific requests from 496-680 that are put at issue in Oracle's Motion and that contain the words "Fix" or "Update" are: 496-507, Amended 508-Amended 519, 520-523, Amended 524-Amended 527, 528-531, Amended 532-Amended 535, 536-539, Amended 540-Amended 563, 564-579, 595-614, and 629-680. *See* Russell Decl. (D.I. 571), Ex. W.

8. The specific requests from 13-50 that are put at issue in Oracle's Motion and that contain the words "Fix" or "Update" are: 19-22. *See* Russell Decl. (D.I. 571), Ex. Y.

9. The specific requests from 496-680 that are put at issue in Oracle's Motion and that contain the term "Generic Environment" are: Amended 508-Amended 519, Amended 524-Amended 527, Amended 532-Amended 535, and Amended 540-Amended 563. *See* Russell Decl. (D.I. 571), Ex. W.

10. The specific requests from 13-50 that are put at issue in Oracle's Motion and that contain the term "Generic Environment" are: 17-18, 27-28, and 44. *See* Russell Decl. (D.I. 571), Ex. Y.

Stipulation Discussions

11. The parties met and conferred regarding a joint stipulation concerning the steps taken to scope, develop, test and deliver objects to TN's HRMS PeopleSoft payroll customers which was one part of TN's business. Defendants submitted a stipulation proposal to Oracle on July 14, 2009.

12. Following Defendants' stipulation proposal, Defendants served their responses to Oracles' Second Set of RFAs on July 20, 2009 including 496-680.

Discussions Regarding Definitions

13. In Oracle's Second Set of RFAs to Defendants, served on May 20, 2009, Oracle defined "generic environment" as "any Local Environment named without reference to any specific Customer (e.g., HR751CSS)." A true and correct excerpt of Oracle's Second Set of RFAs to Defendants, served on May 20, 2009 containing the defined term "generic environment" is attached as **Exhibit A** to this declaration.

14. The definition stated in paragraph 13 above is the definition that Defendants originally objected to and it was that objection that was contained in Oracle's Motion. Exhibit V

1 to Mr. Russell's declaration is not a true and correct copy of portions of Oracles' Second Set of
2 Requests for Admissions to Defendants but rather a copy of "Oracles' Revised Second Set of
3 Requests for Admission to Defendants." (emphasis added) *See* Russell Decl. (D.I. 571), Exh. V at
4 1. This revised set was created as a result of the Parties meet and confer efforts and includes
5 definition and request changes, including a revised definition of "generic environment."

6 15. John Baugh, who was head of the environments team at TN for a period of time
7 and was presented for two days of Rule 30(b)(6) testimony on behalf of TN concerning
8 environment components, only used the term "generic environment" once during that testimony
9 and only after Oracle's counsel had used the term at least 21 times in his questioning, including in
10 the question for which Mr. Baugh used the term. A true and correct compilation of the deposition
11 testimony from Mr. Baugh's February 6 and 7, 2008 deposition which contains the questions and
12 answers that have the terms "Generic Environment" or "Generic Environments" in them is
13 attached to this declaration as **Exhibit B**. This compilation includes Oracle counsel's notation
14 that "generic environment" was a term that he created for the purpose of his questioning. *See*
15 Exhibit B at 3 (referring to p. 139:14-18 of the testimony). Last, I ran a search for "generic
16 environment" and "generic environments" across the 10,395,592 Bates numbered pages produced
17 on behalf of TN and only received 45 hits.

18 16. During meet and confer communications related to the term "generic
19 environment," Defendants stated that they were willing to amend their responses to the RFAs
20 similar to 542 by replacing the phrase "one environment specific to TomorrowNow's retrofit
21 support of specific TomorrowNow customers" with "in one environment that was both specific to
22 TomorrowNow's retrofit support of, and used to support a specific sub-set of, TomorrowNow
23 customers designated to receive retrofit support."

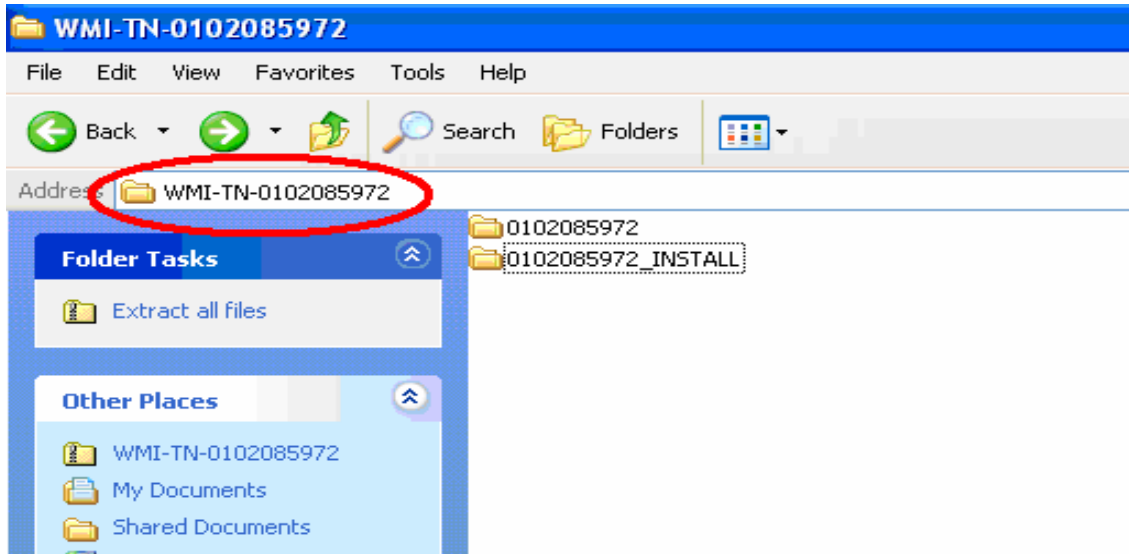
24 17. Further, Defendants were in good faith willing to reexamine RFAs using the term
25 "copy" and informed Oracle of that during the meet and confer process. Oracle's request for this
26 reexamination, however, was not limited to the 223 RFAs put at issue by its Motion but all of the
27 1,315 RFAs served in the case. During the meet and confer process, it was expressed to Oracle
28 that if Oracle was willing to define "copy" as "the word's plain meaning" and withdraw Oracle's

1 previous definitions of that term, then Defendants will no longer rely on their objection to “copy,”
 2 and will constructively remove that objection from Defendants’ responses. Because there are
 3 hundreds of requests that contain the term “copy” and many of those will not need to be
 4 supplemented simply because of the definition change, Defendants during the meet the confer
 5 sought to avoid the time and burden to amend each set of objections for those requests simply to
 6 take out the objection to the term “copy.” Oracle rejected Defendants proposals.

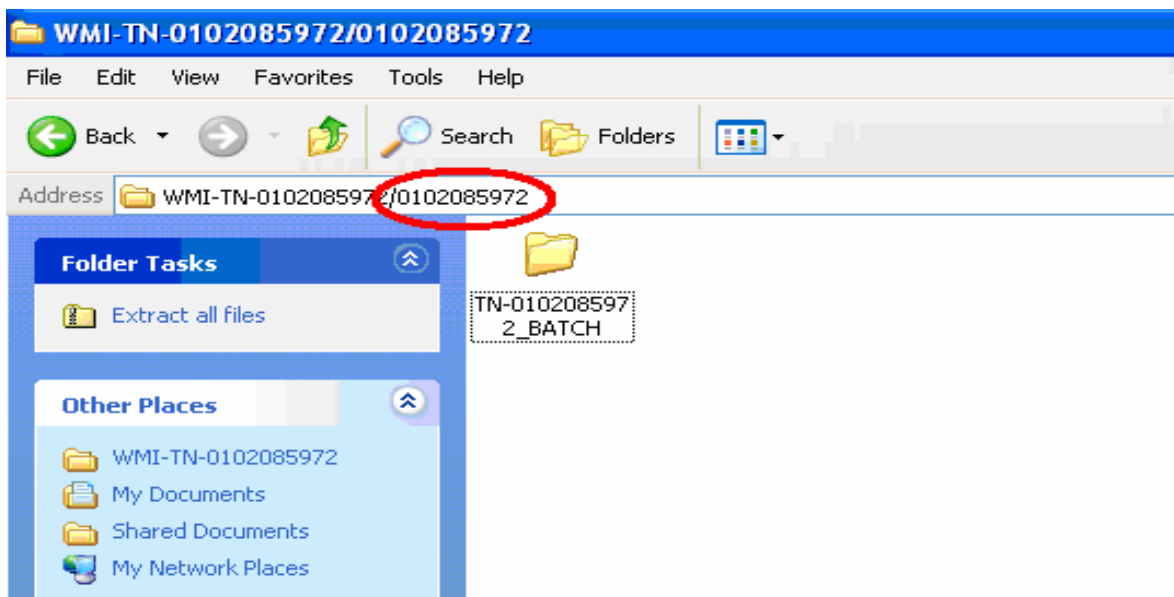
7 18. As an example, RFA 15 from the third set states: “For each item 1-33186 on
 8 Exhibit D, admit that a Copy of the listed Fix Object was Created using a Local Environment that
 9 did not solely consist of an installation from, a Copy of, or an installation from a Copy of
 10 software received from or on behalf of the recipient stated for the respective item.” *See* Russell
 11 Decl. (D.I. 571), Ex. Y. The response currently states as follows: “Subject to the General
 12 Objections and these specific objections, after a reasonable inquiry and based on Defendants’
 13 understanding of these questions, Defendants lack sufficient information to respond to these
 14 requests as the information sought was not tracked, recorded, or maintained by TomorrowNow in
 15 a ‘readily obtainable manner.’ On this basis, therefore, these requests are DENIED.” *See* Russel
 16 Decl. (D.I. 571), Ex. Y. This response would not need to be changed simply because of the
 17 definitional change of “copy.”

18 **Description of Fix Container and Update Container**

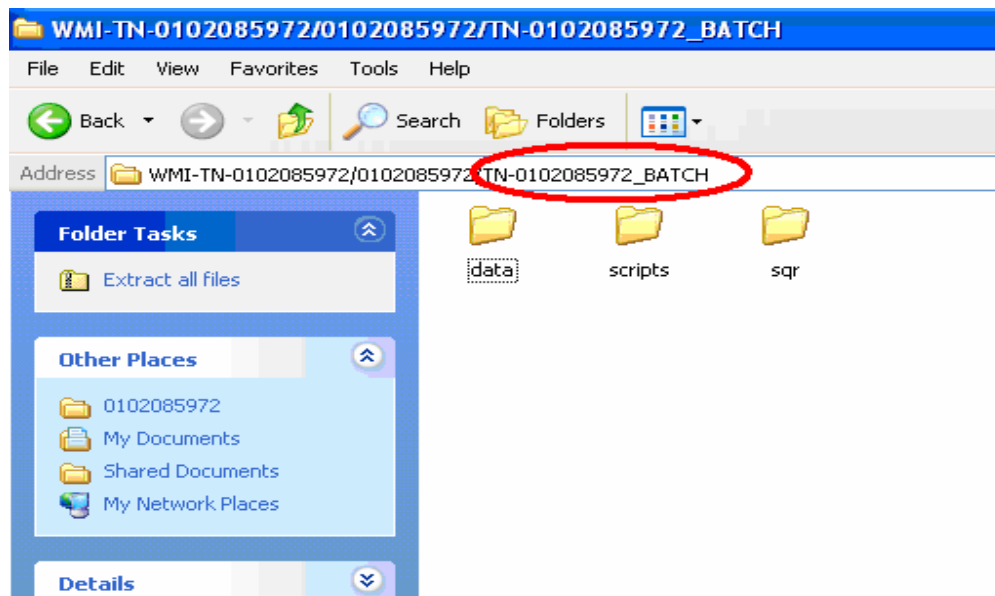
19 19. The following screenshot is the high-level folder structure of the fix container for
 20 WMI-TN-0102085972. It shows that within that container there are two sub-folders. The folder
 21 0102085972_INSTALL contains documentation about the objects contained within this fix
 22 container. The folder 0102085972, contains the objects themselves.



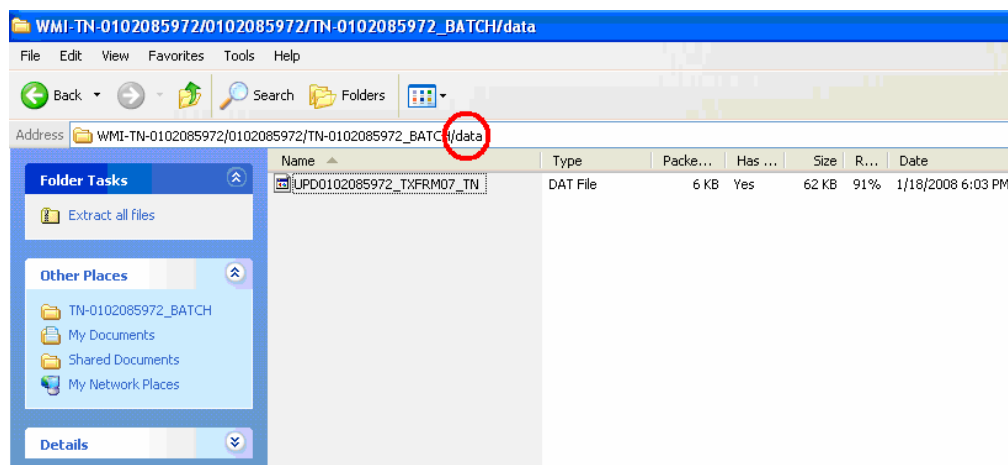
20. The following screenshot shows the sub-folder TN-0102085972_BATCH located in folder 0102085972.



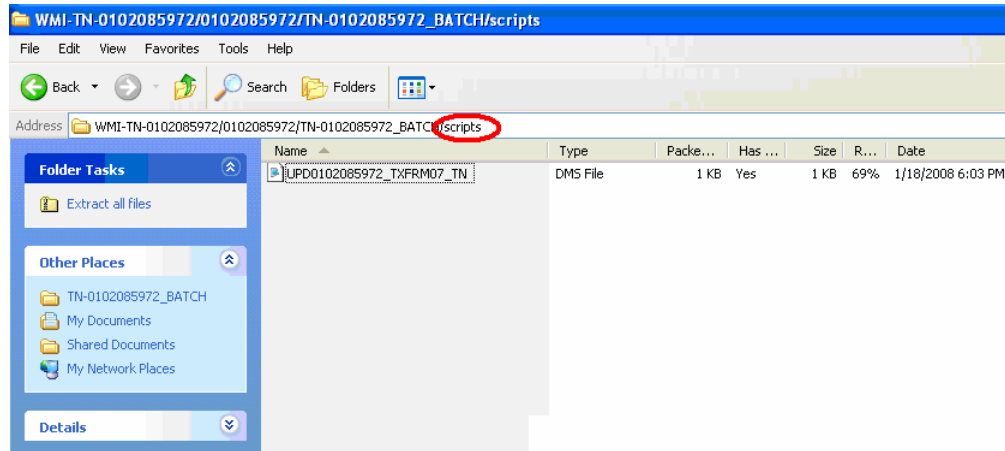
21. The following screenshot shows the three object folders located in the fix container WMI-TN-0102085972 and specifically in the folder TN-0102085972_BATCH. The objects are: (1) .dat files, (2) .dms files (also referred to as script files), and (3) .sqr files.



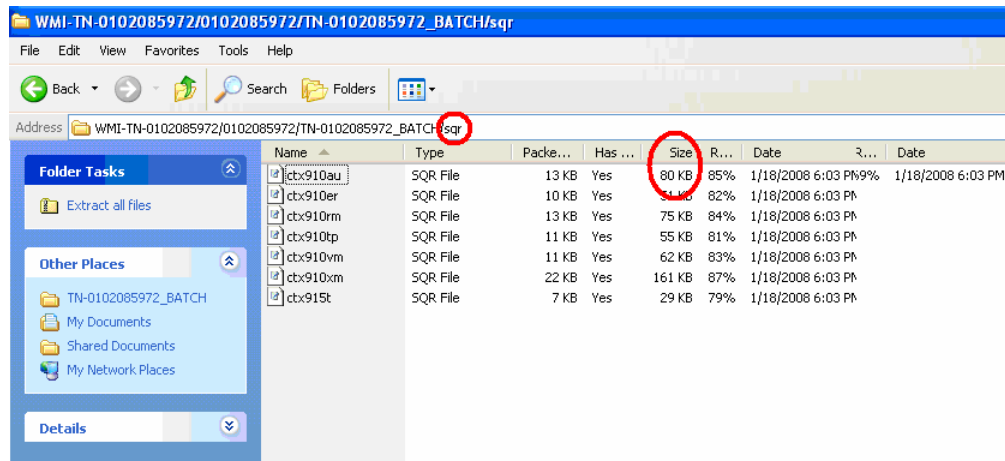
22. The following screenshot shows the single .dat object file that was prepared for delivery to Waste Management as part of the fix container for WMI-TN-0102085972. This .dat object file is located in the data folder shown above.



23. The following screenshot shows the single .dms (script) object file prepared for delivery to Waste Management as part of the fix container for WMI-TN-0102085972. This .dms (script) object file is located in the script folder shown above.



24. The following screenshot shows the seven .sqr object files prepared for delivery to Waste Management as part of the fix container for WMI-TN-0102085972. These seven .sqr object files are located in the sqr folder shown above.



25. Therefore, for this single customer-specific fix, there are a total of nine objects.

26. Likewise, the following screenshot shows the seven .sqr object files prepared for delivery to Robert Half International as part of fix container for RHI-TN-0102085972, which is referenced to the master fix CSS-TN-0102085972. These seven .sqr object files are located under Robert Half's sqr folder as highlighted in the file path below. This folder structure is identical to Waste Management's as shown by the file path. These seven .sqr object files have the same name

as the seven .sqr object files shown above for Waste Management; however, they are different. The .sqr object file sizes for each do not match. The sqr “ctx910au” for Waste Management has a file size of 80kb while the same named file for Robert Half is 75kb.

Name	Type	Package	Has ...	Size	R...	Date	R...	Date
ctx910au	SQR File	12 KB	Yes	75 KB	85%	1/18/2008 6:01 PM	9%	1/18/2008 6:03 PM
ctx910er	SQR File	9 KB	Yes	13 KB	81%	1/18/2008 6:01 PM		
ctx910rm	SQR File	14 KB	Yes	82 KB	84%	1/18/2008 6:01 PM		
ctx910tp	SQR File	13 KB	Yes	67 KB	82%	1/18/2008 6:01 PM		
ctx910vm	SQR File	12 KB	Yes	69 KB	83%	1/18/2008 6:01 PM		
ctx910xm	SQR File	23 KB	Yes	173 KB	87%	1/18/2008 6:01 PM		
ctx915t	SQR File	6 KB	Yes	26 KB	79%	1/18/2008 6:01 PM		

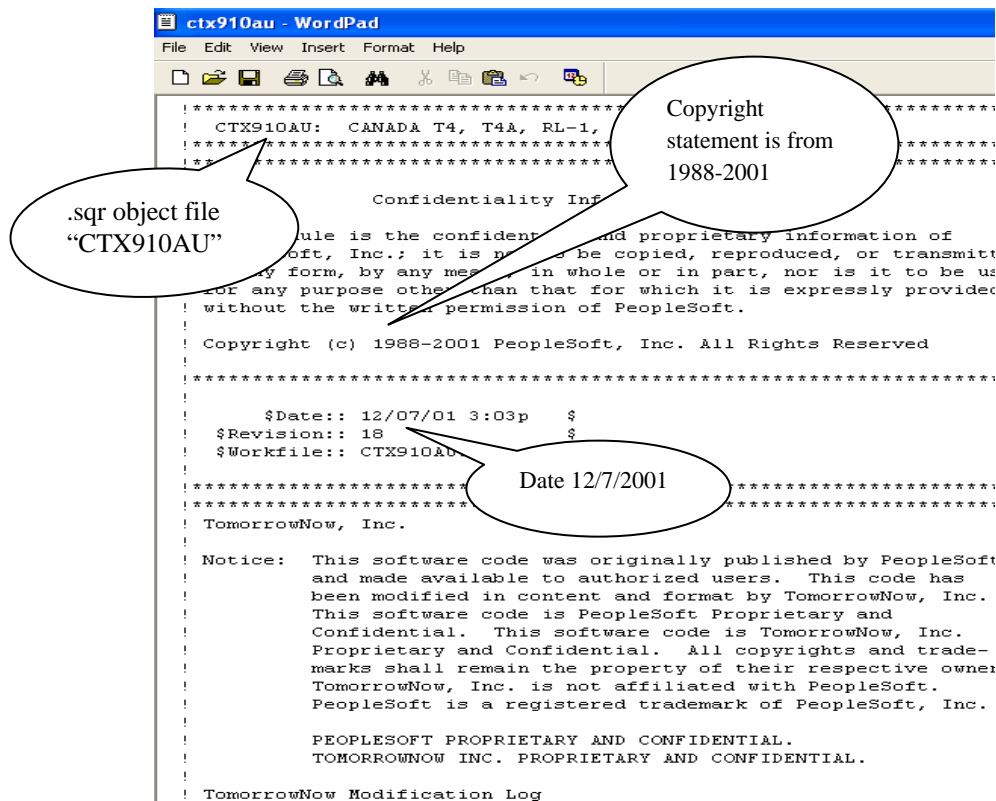
27. A comparison of the header portion of the actual files in the screenshot below shows that the objects are not the same. The screenshot below shows the .sqr object file “ctx910au” that was prepared for delivery to Waste Management as part of fix container for WMI-TN-0102085972. This .sqr object file states that it was created for release “HR88SP1” and it states that it is dated 2/13/2005. The screenshot also indicates that the copyright statement has a date of 2005.

```

*****
! CTX910AU: ***** Audit Report *****
*****
! Confidentiality Information: *****
*****
! This module contains confidential information of Oracle; it is not to be
! in any form, by any means, be used for any purpose other than
! expressly provided under the license agreement.
*****
! Copyright (C) 2005 Oracle. All Rights Reserved.
*****
! $Date: 2005/12/13:08:43:41
! $Release: HR88SP1
! $Resolution: 12208
*****
! TomorrowNow Modification Log
! Modified: TomorrowNow Update - changes
! Modified: Report ID: 0102085972
*****
! #include "environment"
! #Include "Printer and page-size init"
! #Include "Get-Tax-Reporting-Run-Controls procedure"
! #define TAXFORM_NOTES
! #include "rellang.sqr"
*****
! header-report

```

28. The following screenshot shows that the same named .sqr object file “ctx910au” that was prepared for delivery to Robert Half as part of fix container RHI-TN-0102085972. While this .sqr object file has the same name, it is not simply a replica of the “ctx910au” .sqr object file contained in fix container for WMI-TN-0102085972. This object notes a date of July 12, 2001. Further, it shows a copyright statement date of between 1988 to 2001. This .sqr object file also does not list “HR88SP1.”



29. The master fix record and the Waste Management fix container referenced in the paragraphs above are listed in footnote 8 in Oracle’s Motion. That footnote states that Oracle offered to amend Exhibit B to name customer specific fix containers as opposed to the master fix records and that Defendants stated that doing so would not change Defendants’ responses. Defendants did not state that doing so would not change their answers. Rather, Defendants stated that it would be necessary to see such a revision before committing to a response, and to the extent the request would then be written in a way that required Defendants to evaluate the history of 1000s of objects, Defendants would likely raise a burden argument.

30. There are approximately 96 objects that were prepared for delivery to the ten customers identified as having the issue identified with Master Fix record CSS-TN-0102085972.

Exhibits to Oracle's RFAs and Associated Counts

31. Oracle's Exhibit A to its Second Set of RFAs contains a printout of a list of the master bundle records from the SAS database. It is not a list of actual bundle containers prepared for delivery to customers.

32. Oracle's Exhibit B to its Second Set of RFAs contains a printout of a list of the master fix records from the SAS database. It is not a list of actual fix containers prepared for delivery to customers.

33. Oracle's Exhibit D to its Third Set of RFAs is a 973 page, small font spreadsheet with 33,186 listings of file paths that contain objects.

34. Oracles' RFAs 13-50 from the third set and RFAs 130-162 from the fifth set all reference Exhibit D and request an admission to either all, or a subset of the, 33,186 objects listed. RFAs 13-44 and 130-159 make requests for each of the 33,186 objects listed. Together, this is 62 numbered requests multiplied by 33,186 which equals 2,057,532 number of requests which require an answer. RFAs 45-50 and RFAs 160-162 make requests for 14,725 objects listed. Together, this is 9 numbered requests multiplied by 14,725 which equals 132,525 number of requests which require an answer.

Definition of Fix

35. Oracles' technical expert, Kevin Mandia, defines a "Fix" as:

"Fix" means any software application patch, fix, code change, or Update, including bug fixes, tax or regulatory updates, or Bundles. Fixes typically address known or reported issues with the functionality of the software that can be corrected by applying new or modified code or other data, in the form of Fix Objects, for example to address new regulatory requirements that affect payroll software. They can be delivered individually, or grouped with other Fixes and delivered as Updates or bundles. With respect to the PeopleSoft product family, Fixes typically included one or more of the following types of files: COBOL source code files, SQR files, SQC files, DAT files, DMS files (Data Mover Script files), Project Files, Online Objects, and documentation.

1 **Interrogatory 14**

2 36. Defendant TomorrowNow, Inc.'s Third Amended and Supplemental Response to
3 Plaintiff Oracle USA, Inc.'s Second Set of Interrogatories No. 14 ("Interrogatory 14") and RFAs
4 13-50 and 130-162 all request detailed descriptions for how environments at TN were used to
5 create, develop and test objects. In response to Interrogatory 14 and this Court's August 31, 2009
6 Order limiting Defendants response to 10 specific master fix records, Defendants provided Oracle
7 a 136 page response. A true and correct copy of the request and response is attached to this
8 declaration as **Exhibit C**.

9 37. To provide the narrative responses in Interrogatory 14, TomorrowNow, reviewed
10 extensive records including data from the SAS and BakTrak databases, TomorrowNow's servers,
11 produced documents, deposition testimony, and either communicated with or attempted to
12 communicate with numerous former TomorrowNow employees that appeared to be involved in a
13 substantive way with each master fix record for which a response was provided. *See* Exhibit C at
14 137-146.

15 38. Defendants' response contained a description of approximately 1,772 objects
16 reasonably believed to be made available to specific customers in relation to the ten identified fix
17 records. *See* Exhibit C.

18 39. To provide that response Defendants expended over 500 attorney hours. *See*
19 Exhibit C at 137-138.

20 40. Based on the prior time and costs associated with Interrogatory 14, if Defendants'
21 objections were overruled and were compelled to respond to RFAs Nos. 13-50 in Set No. 3 and 4-
22 63 and 130-162 in Set No. 5 in the manner in which Oracle seeks a response, Defendants
23 anticipate having to spend literally thousands of attorney hours, costing millions of dollars, to
24 respond to the literally millions of requests contained in those RFAs.

25 **Interrogatory 11**

26 41. RFAs 4 - 63 from the fifth set relate to file paths identified in Defendants'
27 response to Defendant TomorrowNow, Inc.'s Eighth Amended and Supplemental Response to
28 Plaintiff Oracle Corporation's First Set of Interrogatories (Set One) No. 11 ("Interrogatory 11").

1 A true and correct copy of the Interrogatory 11 request and response is attached to this declaration
 2 as **Exhibit D**. The response to Interrogatory 11 contains 84 distinct file paths in all amended and
 3 supplemental responses. One of those file paths is DCITBU01_G\PeopleSoft.

4 DCITBU01_G\PeopleSoft was produced on four hard drives bates numbered TN-OR 02989991,
 5 TN (Hard drive).27; TN-OR 02989992, TN (Hard drive).28; TN-OR 02989993, TN (Hard
 6 drive).29; and TN-OR 02989994, TN (Hard drive).30 on October 25, 2008 date. At my direction,
 7 a file count for each hard drive was obtained using the software program EnCase. For TN-OR
 8 02989991, TN (Hard drive).27, there were approximately 731,537 files listed. For TN-OR
 9 02989992, TN (Hard drive).28, there were approximately 1,037,144 files listed. For TN-OR
 10 02989993, TN (Hard drive).29, there were approximately 1,030,937 files listed. For TN-OR
 11 02989994, TN (Hard drive).30, there were approximately 940,636 files listed. This totals
 12 approximately 3,740,254 files. RFAs 5 and 35 specifically ask about DCITBU01_G\PeopleSoft.

13 42. For the DCITBU01_G\PeopleSoft example listed above, assuming it only 30
 14 seconds to click and evaluate each of the 3,740,254 files it would take one person approximately
 15 1,870,127 minutes which is approximately 31,169 hours or 1,299 days. Based on these estimates,
 16 and if Defendants' objections were overruled and were compelled to respond to RFAs Nos. 13-50
 17 in Set No. 3 and 4-63 and 130-162 in Set No. 5 in the manner in which Oracle seeks a response,
 18 Defendants anticipate having to spend literally thousands of attorney hours, costing millions of
 19 dollars, to respond to the literally millions of requests contained in those RFAs.

20 I declare under penalty of perjury under the laws of the United States and the State of
 21 California that the foregoing is true and correct.

22 Executed this 5th day of January, 2010 in Houston, Texas.

23
 24
 25 /s/ Joshua L. Fuchs
 26 Joshua L. Fuchs
 27
 28